

Avoiding and Minimizing Land Use Lawsuits

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Why Do Lawsuits Happen?

- Angry people
- Careless mistakes
- Arbitrary decisions
- Other reasons?

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Reasons Why You May Be Sued

- Violation of substantive law
 - Constitutional – e.g., taking, equal protection, due process, speech, and religion
 - Statutory and common law
 - Local ordinance
- Improper procedure
 - Failure to follow mandatory procedures
 - Easy win for plaintiffs

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The Police Power

- Authority to protect public health, safety and welfare “reserved” to the States under Tenth Amendment
- Delegated to local government by “enabling” statutes subject to federal and state laws
 - Counties may enact ordinances to protect public health, safety and welfare
 - Local ordinances must conform to enabling statutes

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Local Government Regulatory Authority

- ***State v. Hutchinson***, 624 P2d 116 (Utah 1980)

When the state has granted general welfare power to local governments, those governments have independent authority apart from and in addition to specific grants of authority to pass ordinances that are reasonably and appropriately related to the objectives of that power, i.e., providing for the public safety, health, morals, and welfare. *And the courts will not interfere with the legislative choice of the means selected unless it is arbitrary, or is directly prohibited by, or is inconsistent with the policy of the state or federal laws or the constitution of this State or of the United States.*

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County Regulatory Authority

- **UCA 17-50-301 et seq.**

A county may provide a service, exercise a power, or perform a function that is reasonably related to the safety, health, morals, and welfare of county inhabitants, except as limited or prohibited by statute.

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County Land Use Authority

- UCA 17-27a-102 (CLUDMA)

Counties may enact all ordinances, resolutions, rules and may enter into other forms of land use controls and development agreements that they consider necessary or appropriate for the use and development of land within the unincorporated area of the county, including ordinances, resolutions, and rules, restrictive covenants, easements, and development agreements governing uses, density, open spaces, structures, buildings, energy-efficiency, light and air, air quality, transportation and public or alternative transportation, infrastructure, street and building orientation and width requirements, public facilities, fundamental fairness in land use regulation, considerations of surrounding land uses and the balance of the foregoing purposes with a landowner's private property interests, and height and location of vegetation, trees, and landscaping, unless expressly prohibited by law.

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County Land Use Authority

- Counties:

- May enact all ordinances, resolutions, and rules
- May enter into other forms of land use controls and development agreements
- Considered necessary or appropriate for use and development of land
- Within unincorporated county area
- Includes ordinances, resolutions, and rules, restrictive covenants, easements, and development agreements governing:
 - Uses, density, open spaces, structures, buildings, energy- efficiency, light and air, air quality, transportation and public or alternative transportation, infrastructure, street and building orientation and width requirements, public facilities,
 - Fundamental fairness in land use regulation
 - Considerations of surrounding land uses and balancing foregoing purposes with a landowner's private property interests, and height and location of vegetation, trees, and landscaping
- Unless expressly prohibited by law

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Limits on County Land Use Authority

- Federal/state law preempts (overrides) conflicting local law
- Many federal and state laws affect land use such as:
 - Fair Housing Act
 - Clean Water Act (wetlands)
 - Billboards
 - See handouts – *Federal and State Statutory Law Affecting Land Use*

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• Delegation of Police Power Authority

- Municipalities and counties may use virtually any zoning technique as long as it:
 - Does not violate federal or state constitutions
 - Does not violate a state or local law
 - Is not arbitrary, capricious, or discriminatory

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- **Delegation of Police Power Authority**

- Exercise of the police power must:
 - Protect public health, safety, and welfare
 - Not deprive an owner of all “economic use”
 - Not be exceed scope of authority
 - Include reasonably clear and definite regulations
 - Must give reasonable notice of what is required to staff and public
 - Must include decision criteria

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Common Problem Areas

- Distinguishing between legislative and administrative action
- Procedural violations
- Vested rights
- Exactions
- Impact fees
- Conditional use permits
- Residential facilities (group homes)
- Ambiguous ordinance provisions

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The Land Use Approval Process

- *Policy*
 - Annexation
 - General plan
 - Capital improvement program
 - Annual budget
- *Implementation*
 - Zoning regulations
 - Subdivision regulations
 - Building and health codes
 - Construct capital improvements

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Legislative vs. Administrative Action

- *Legislative* - making the law, a fundamentally political process
- *Administrative* - applying the law to specific, individual circumstances
- *Quasi-judicial (adjudicative)* - applying predetermined but often general standards that require the making of findings; appeals

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Approving or Denying a Land Use Application

- Legal basis for action depends on:
 - Type of proceeding
 - Legislative
 - Administrative
 - Quasi-judicial
 - LUDMA rules
 - Local ordinance rules

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Legislative Action

- Adopting an ordinance, map, general plan, annexation
- Presumption of validity
- Ex parte contacts permitted
- "Public clamor" permitted
- Very deferential
 - Will be upheld if a reasonable basis exists to conclude the action "could advance" the public welfare
 - May be overturned if action is "arbitrary or capricious"
 - i.e., not "reasonably debatable"
 - "Strict" or "heightened" scrutiny applies in limited cases
 - Fundamental rights
 - Suspect classifications

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Administrative and Quasi-Judicial Action

- Conditional use permit, subdivision, site plan review, building permit
- Approval standards set by legislative body in enacting ordinance
 - "Standardless" administrative approvals likely to be deemed:
 - Unconstitutional delegation of power
 - "Arbitrary and capricious"
- Reduced presumption of validity
- Ex parte contacts not permitted
- Public clamor not permitted

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Administrative and Quasi-Judicial Action

- May be overturned if the action is:
 - "Illegal"
 - Procedurally flawed or inconsistent with a statute or common law rule
 - "Arbitrary or capricious"
 - No "substantial evidence" in the record
 - If a record exists, no new evidence can be taken by the court (unless improperly excluded)
 - Decision must be affirmed if supported by substantial evidence
 - "Substantial evidence" means:
 - Information that would convince a reasonable mind
 - More than a "scintilla" but less than a "preponderance"

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Approving or Denying a Land Use Application

- Local ordinances should have an administration and procedures chapter
 - Specify each application type
 - Who approves it
 - Approval criteria
 - Scope of approval
 - Appeal procedure
 - Duration of approval
- See handout – *Land Use and Appeal Authorities*

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Approving or Denying a Land use Application

- Make proper findings
 - A citation of *specific facts* about an application which:
 - Decision-maker finds to be true
 - Lead to conclusion that the application does or does not conform to legislatively established criteria
 - Information is not the same thing as facts
 - Evidence must be weighed by the decision-maker
 - Burden of proof is on the applicant
 - Ask questions to elicit factual testimony
- Use Report of Action forms
- See handout – *Tips for Creating an Administrative Record*

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Vested Rights

- An administrative land use application must be approved if it conforms to the ordinance in effect when a complete application is submitted unless:
 - An ordinance has been formally initiated which would prohibit approval, or
 - A compelling public interest would be jeopardized by approval
 - High standard
 - Government has burden of proof

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Vested Rights

- Practical effect of rule:
 - Must anticipate problems in advance of their occurrence and draft ordinances to deal with them
 - Very difficult to deny an *administrative* application that complies with rules in effect when the application is made
- Reasonable diligence required to maintain vested right status
- Specify duration of land use approvals in ordinance

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Exactions

- What is an exaction?
 - Dedication of land or facility for public use
 - Road, street rights-of-way
 - Drainage rights-of-way and facilities
 - Upsizing improvements
- Generally imposed on ad hoc basis

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Exactions

- A county may impose an exaction on development proposed in a land use application if:
 - An essential link exists between a legitimate governmental interest and each exaction; and
 - Each exaction is roughly proportionate, both in nature and extent, to the impact of the proposed development
 - Separate rule for water exactions
- If property acquired by an exaction is sold within 15 years, it must first be offered to the prior owner
 - Does not apply to a community development or urban renewal agency (RDA)

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Impact Fees

- Money charge imposed on new development to mitigate impact of on public infrastructure
 - Water rights and water supply, treatment, and distribution facilities
 - Wastewater collection and treatment facilities
 - Storm water, drainage, and flood control facilities
 - Municipal power facilities
 - Roadway facilities
 - Parks, recreation facilities, open space, and trails
 - Public safety facilities (except jails or prisons)
 - Environmental mitigation
 - NOT schools

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Impact Fees

- Must follow very specific statutory process to justify
 - Cannot use to cure existing deficiencies
 - Notice and hearing
 - Impact fees facilities plan and analysis
 - Preparer/entity must certify compliance with Impact Fees Act
 - Impact fee enactment (ordinance)
- Must comply with accounting rules
- Must encumber within 6 years
 - May extend for “extraordinary and compelling” reason to date certain

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Conditional Use Permits

- NOT a discretionary device
- Must be approved if reasonable conditions can be imposed :
 - To mitigate the reasonably anticipated detrimental effects of a proposed use
 - In accordance with applicable standards
- Can deny only if reasonably anticipated detrimental effects cannot be substantially mitigated by imposing reasonable conditions

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Residential Facilities

- A residence where more than one person with a disability resides
 - Licensed or certified by Utah Department of Human Services or Utah Department of Health
- Must be allowed to the same extent other residences are allowed
 - "Group home" is a generic term and has no specific legal meaning
 - "Disability" means a person with mental or physical impairments which substantially limit one or more "major life activities"
 - "Impairment " includes HIV infection, alcoholism, prior drug addiction, chronic fatigue, learning disability

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Residential Facilities

- Each county must adopt an ordinance that:
 - Complies with the Fair Housing Amendments Act ("FHAA") and Utah Fair Housing Act ("UFHA")
 - Allows RFPDs to the same extent that residential dwellings are allowed
- Must grant a "reasonable accommodation" to allow residential facility if it does not:
 - Impose an undue burden or expense on the local government
 - "Fundamentally alter" the zoning scheme
 - What is "reasonable" in one circumstance may not be "reasonable" in another
- LUDMA rules a trap for the unwary
 - Get legal help if you have a group home issue

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Ambiguous Ordinances

“Legislative and rule drafting is not simply just another form of legal drafting. It is by far the most difficult because of the complexity of the problems it addresses, the vagaries of process by which its product is adopted, the unknown nature of its audience, and the permanency of its product. The importance of legislation and rules can hardly be overemphasized. They control virtually every aspect of modern-day life.”

Robert Martineau

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Drafting an Effective Ordinance

- **Determine authority**
 - Police power
 - Constitutional limitations
 - Statutory limitations
 - Preemption
 - LUDMA

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Drafting an Effective Ordinance

- Understand court rules of interpretation
 - Primary goal is to give effect to legislative intent
 - Presumption of validity
 - Will interpret provisions in harmony with other related provisions to avoid conflicts
 - Will presume each term is used advisedly

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Drafting an Effective Ordinance

- Court rules of interpretation
 - Ordinances strictly construed in favor of property owner (because ordinances are in derogation of common law of unrestricted property rights)
 - Will first consider “plain language” of the statute as a whole
 - Will look to legislative intent only if ordinance is ambiguous

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Drafting an Effective Ordinance

- Determine scope of legislative action
 - Goal-what is the problem to be solved?
 - Scope-who will the ordinance apply to?
 - Uniformity versus flexibility
 - Specificity versus discretion
 - Consistency with existing regulations

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Drafting an Effective Ordinance

- Ordinance structure
 - Locating definitions
 - Locating substantive provisions
 - Consistency with state and federal law
 - Elements of proof
 - Enforcement considerations

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Drafting an Effective Ordinance

- Avoiding ambiguity
 - Assume a local housing assistance program includes definition for “qualifying low income household”
 - Is this the same as a federally defined “low income household”?
 - Better to create new term such as “county housing program recipient”

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Drafting an Effective Ordinance

- Avoiding ambiguity
 - Assume a new rule: “Homeowners may not landscape yards with non-native trees.”
 - What must be proved to enforce a violation?

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Drafting an Effective Ordinance

- Avoiding ambiguity
 - What must be proved to enforce a violation?
 - A homeowner (not a tenant) planted a tree
 - The tree must be in the yard (is this the entire lot?)
 - The tree must not be native to the area
 - It must be tree (not a bush)

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Drafting an Effective Ordinance

- Avoiding Ambiguity
 - Simpler and better formulation: “Only trees shown on the County’s Native Tree List may be planted on a residential lot.”

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Drafting an Effective Ordinance

- Style considerations
 - Be gender neutral
 - Use “shall” for required action; “may” for permissive
 - Avoid opinion or subjective words
 - Instead of “adequate” write objective standards
 - Instead of “18 years or younger” write “under the age of 18 years”
 - Use short sentences
 - Tabulate for clarity
 - Use headings

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Other Possible Problem Areas

- Taking without just compensation
- Due process
- Equal protection

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Taking Without Just Compensation

- Local governments may acquire private property for a public use if the owner is paid fair market value ("just compensation")
- If a regulation severely reduces the beneficial use of the property for an owner, and no compensation is paid, is there a constitutional taking?

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Taking Without Just Compensation

- A regulation must have:
 - A legitimate public purpose
 - Leave the owner some economic use or benefit from the land

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Taking Without Just Compensation

- Per se takings
 - Government invasion of private property
 - No reasonable economic use of property
 - Substantial diminution of value may still be reasonable
- Three-factor taking test (if not “per se”)
 - Character of government action
 - Economic impact of the regulation
 - Investment-backed expectations
- Exactions that have no nexus or rough proportionality

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Due Process

- Law must have a legitimate purpose
 - Must be a reasonable relationship between what the law requires and that purpose
- Due process guarantee intended to assure laws are not unreasonable (“arbitrary or capricious”)
 - Procedural - Government decision-making process must fairly allow citizen participation; equal access
 - Substantive - Regulations must be clear, reasonable, and advance a legitimate government purpose
- Law is presumed to be constitutional
 - Plaintiff must prove that the law is arbitrary or irrational

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Due Process

- Those who administer land use regulations must be aware of:
 - Clarity and fairness of regulations
 - Fairness of public meetings where regulations are explained and administered
- Must adopt public meeting rules of order
 - Parliamentary order and procedure
 - Ethical behavior
 - Civil discourse
 - See HB 267, 2011 General Session

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Equal Protection

- General rule: All citizens must be treated alike under the law unless a legitimate reason exists for treating them differently
- Two similar parcels of land with different zones should have a rational basis (a good reason) for differentiation
 - Zoning must have a valid police power objective
 - A good defense is based on the general plan

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Equal Protection

- If land use regulations have a particular impact on a distinct class of persons, the regulations may be invalidated unless the different effect can be justified
- If the class of persons adversely affected is a minority group, the classification is immediately suspect and likely improper
 - Strict scrutiny applies

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Improve the Odds of Winning A Lawsuit

- Avoid conflicts of interest
- Give proper notice and follow correct procedure
 - Don't ask your attorney if it's OK to ignore something done wrong
 - A do-over is better than a lawsuit
- Be fair and considerate
 - Provide due process at the hearing
 - Avoid improper bias
 - Adopt consistent hearing/meeting procedures
 - "There is nothing worse than an undelivered speech" - Rex Lee
- Know legislative and administrative standards of review
 - Know who has the "burden of proof"
 - Understand the limits of Imposing conditions

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Improve the Odds of Winning A Lawsuit

- Make a good record
 - Starts on Day 1
 - Be clear about what is approved - and what is not - and why
 - Authenticate records
- Make proper findings
- Be consistent
 - Avoid "special deals"
 - Record code interpretations
- Keep a copy of relevant rules at the dais
 - Refer to them during a meeting/hearing
 - Relate code to facts of the case
 - Don't exceed your authority

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Improve the Odds of Winning A Lawsuit

- Make sure your general plan and ordinances are:
 - Up-to-date
 - Clearly drafted
 - County commission/council, boards, commissions, and staff know how to use them
- Think about development timing
 - Zoning property before it is ready for development
 - Large projects that will take years to complete
- Availability and adequacy of infrastructure
- Don't unreasonably delay making a decision
 - *Bluffdale* case

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Improve the Odds of Winning A Lawsuit

- Use a knowledgeable attorney at meetings
 - Avoids errors
 - Cheaper than a lawsuit
- Keep your code up to date
 - Remove ambiguities
 - Include a procedures section
- Sources of help in addition to UCIP
 - American Planning Association
 - Utah Land Use Institute
 - Utah Property Rights Ombudsman
- See handout – *Keeping Out of Trouble*

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In a Nutshell

- Lawsuit avoidance boils down to good management
 - Be aware of the rules and consistently apply them
- Procedures are not only about following the law
 - They provide evidence that you did follow the law
- An angry plaintiff may sue you anyway
 - But you can avoid costly outcomes by carefully following the rules